
Government of the District of Columbia



Office of the Attorney General

Testimony of
Robert J. Spagnoletti
Attorney General

***Public Oversight Hearing
FY 2005 Performance of the Office of the
Attorney General***

Committee on the Judiciary
Phil Mendelson, Chair
Council of the District of Columbia

November 3, 2005

Room 412
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004
10:00 a.m.

Deleted: 500

I. Introduction

Good morning, Chairperson Mendelson, Members of the Committee on the Judiciary, other Councilmembers, and guests. I am Robert Spagnoletti, Attorney General for the District of Columbia. It is my pleasure to come before you today for a preliminary discussion of the Fiscal Year 2005 performance of the Office of the Attorney General for the District of Columbia (the “Office,” or “OAG”). Although she is not at the table, accompanying me today is Benidia Rice, Deputy Attorney General for the Child Support Services Division and Director of the District’s State IV-D Program.

Although I will appear before this Committee early next year with a full report on OAG’s activities during Fiscal Year 2005 and early Fiscal Year 2006, this hearing gives me a chance to preview some of the Office’s most important achievements. Because Chairperson Mendelson and I meet regularly concerning OAG matters, my testimony will only touch on the highlights. I will also discuss the status of our transitioning of the subordinate agency counsel as full-fledged members of the OAG family.

II. OAG’s Success under Performance Measures for FY 2005

This appearance marks my third oversight hearing as head of the Office, and I can honestly say that the steady progress we are making in achieving – and often exceeding – our goals makes this the best oversight hearing so far in terms of what I have to report. As you know, many of OAG’s performance measures changed starting on October 1, 2005 (the start of Fiscal Year 2006) to better reflect how the Office actually conducts its business. We therefore have the information on how well the Office did under the old performance measures through September 30th, except that for the old measures being discontinued in Fiscal Year 2006 we collected data only through July 31st. As a baseline for comparison purposes, during Fiscal Year 2005 we also began collecting data for some of the new performance measures, although they did not take effect until last month. While I don’t want to inundate the Committee with statistics, I think OAG’s performance under a number of the old and new measures is revealing. For example:

- Goals for Litigation Programs. Our civil and criminal litigating divisions – Appellate, Civil Litigation, Family Services, and Public Safety, which contain over 200 (as of October 24, 2005) of the

Office's ablest attorneys and support personnel – met or exceeded all except one of their six Fiscal Year 2005 performance measures. Our affirmative civil trial litigators, who handle matters such as agency collections, fraud against the government, and consumer protection, did extremely well, winning over 97% of the time, as against a goal of 90%. Our defensive civil trial litigators, with a heavy caseload of tort and equity claims against the government, won almost 91% of their cases, also against a goal of 90%. While it is a new measure for 2006, we kept track of the percentage of defensive appeals favorably resolved for the government in Fiscal Year 2005 and are proud to say that through September 30th the Appellate Division won 89% of the time, as compared with the new goal of 90%.

Our prosecutors of adult and juvenile offenses also did extremely well. 65% of the more than 8,000 adult cases presented were resolved by OAG, which substantially meets the goal of 75%. (This goal is almost impossible to meet due to the time it takes for these cases to wend through the court system and the small number of attorneys assigned to handle these cases. This measure will be replaced in 2006 with the percent of adult criminal cases resolved in the government's favor.) In addition, OAG saw to it that almost 93% of juveniles appropriately presented received rehabilitation services, well beyond the 80% goal.

While it is a new measure for 2006, we collected data during Fiscal Year 2005 showing that the Family Services Division, which handles child abuse and neglect cases, domestic violence matters and mental health and mental retardation proceedings, very significantly exceeded the goal of 80% of family services cases presented and resolved favorably to the government's position. In fact, through September 30, 2005, the Division met this goal over 97% of the time!

With a score of 88%, OAG substantially met the goal of investigative reports meeting internal quality assurance standards for timeliness, accuracy, and completeness 90% of the time. The only measure relating to Litigation Programs that OAG failed to meet was a two percentage reduction in expenditures for tort litigation. We were on target until September of this year, when, after discussions with the Office of the Chief Financial Officer and the Office of Risk Management, we decided to expedite the processing of all pending

tort settlements and to accelerate final settlement discussions on cases close to settlement to make maximum use of the Fiscal Year 2005 appropriation for the Settlements and Judgments Fund. Otherwise, we would have had millions of unused appropriations for the Fund, in line with the target of a 2% reduction in spending, and many of the same cases would have been settled using the Fund's appropriation for 2006. The practical decision we made, plus other factors, caused the spending under this target to shoot up in Fiscal Year 2005 and we did not achieve the 2% reduction goal. We should have a better perspective on this measurement in Fiscal Year 2006, when we add a new measure, the number of closed cases. If history repeats itself, we may see a large number of cases closed, coupled with difficulty in meeting the target of a 2% reduction in spending on tort litigation.

- Goals for Legal Advice and Transactions Programs. Our relatively smaller Commercial and Legal Counsel Divisions – which handle the review of and furnish advice concerning, among other things, procurement, real estate, land use, legislation, and rulemaking, and which contain approximately 50 attorneys and support staff – each had a similar goal: to complete transactional agreements and documents (Commercial Division) and responses to requests for legal advice and review (Legal Counsel Division) within agreed-upon time frames 90% of the time. Both Divisions succeeded. The Commercial Division fell somewhat short of the goal with a score of almost 78%, while the Legal Counsel Division significantly exceeded the goal with a score of approximately 97%. This was a remarkable feat, given the huge press of work on their small staffs – almost 2,300 documents reviewed in the Commercial Division and over 1,500 legal memoranda issued by the Legal Counsel Division. This work included the legal activities in the Commercial Division regarding numerous economic development initiatives and the legal issues surrounding the return of baseball to the District, which significantly impacted both divisions.
- Goals for Child Support Program. I am perhaps proudest of the astonishing achievements last year of the Child Support Services Division (“CSSD”), which employs almost 190 attorneys and support personnel – roughly 40% of OAG’s total workforce of approximately 500 talented and hard-working men and women and approximately 45% of its total budget. More than 90,000 children depend on CSSD

to receive funds needed for food, shelter, health care, and education. CSSD had four performance measures in Fiscal Year 2005, and it exceeded the three primary ones spectacularly. First, it increased the number of support orders established by almost 22%, as compared with the goal of 2.5%, for a total of over 1,700 new orders. Second, it increased total child support collections by over 9%, to more than \$62 million, as compared with the goal of 2.5%. Third, as part of these collections, it increased arrears collections by an astounding 14.5%, again as compared with the 2.5% goal. These phenomenal achievements, which exceeded CSSD's performance measures by 360% to 880%, reflect the strong positive direction our child support program has taken over the last couple of years. The only measure reflecting under-performance is the successful service of notice of hearings, which occurred over 53% of the time, but below the 70% goal because more than one-third of all persons needing to be notified have no known address. This outmoded measure is not part of our measures for 2006.

- Goals for Agency Management. There are five goals for this function, in which approximately 30 employees provide operational support to the Office as a whole in such areas as human resources, training, contracting and procurement, property management, information technology, and communications. Two of the goals – cost of risk and percent variance of estimate to actual expenditure – are reported with city-wide figures. A third goal, dollars saved by agency-based labor-management partnership projects, is unreportable and has been omitted from our Fiscal Year 2006 reporting measures. I do have complete data on the two remaining measures, however, which OAG met or exceeded. The results for October 2004-September 2005 are in, and they show OAG surpassed its target goal of a rating of 4 out of 5 for telephone service quality. (We did not pass the target during the last quarter of Fiscal Year 2005, which we believe is due to the cutover to DC-NET and the technical problems we experienced with much of our telephone equipment.) For the first time, OAG has consistently ranked in the top half of all agencies rated in Fiscal Year 2005 by EOM Customer Service Operations for the telephone service quality criteria of courtesy, knowledge, etiquette, and overall impression. All OAG staff deserve kudos for this splendid achievement, despite their hectic and stressful workloads. Finally, OAG exceeded the performance target of 70% for key results

measures achieved because the Office met or exceeded the target under 10 of its 13 goals, for an overall score of 77%.

These outstanding results reflect the commitment and dedication of OAG's highly talented people, who recently received recognition of their successful work when the Mayor submitted and the Council approved a salary package that brings OAG attorney pay close to parity with the pay of attorneys in the federal government. On November 1st, the Council completed the circle by approving a new compensation package for the subordinate agency counsel in the lawyer's collective bargaining unit who were transferred to OAG effective on October 1st. My staff and I want to thank this Committee, the Council, and the Mayor for supporting these wage increases, which are essential to keep our ablest attorneys from leaving and to attract the best and brightest legal talent to fill future vacancies.

III. Specific OAG Accomplishments During Fiscal Year 2005

The statistics I quoted earlier give this Committee a bird's eye view of how well OAG performed during the last fiscal year. Now I will highlight, by practice area, some of the significant activities that those statistics capture. My testimony at OAG's annual oversight hearing early next year will of course provide a more comprehensive picture.

Litigation Programs

- Civil Litigation Division. In successfully defending tort claims against the government, the General Litigation Sections resolved hundreds of cases through 1) motions to dismiss or for summary judgment that the courts granted, 2) trials that were either outright defense verdicts or the amount of the verdict was less than the plaintiff's last settlement demand, and 3) favorable settlements. Of the 215 cases resolved through settlement or judgment, in only 11 cases were there any monetary judgments against the government. In only 45 cases was the settlement or judgment \$50,000 or more. Of the 204 settlements; the amount in 93 cases (46%) was less than \$10,000. There were only two cases with a settlement or judgment in seven figures: a judgment of \$1.65 million against the University of the District of Columbia and a settlement of \$12 million in the *Marcus Bynum* class action suit against the Department of Corrections, which the court has preliminarily approved and where plaintiffs alleged that

thousands of inmates who were ordered released by the court had been subjected to illegal strip searches and were detained past the required release date. Under that agreement, \$3 million will be returned to DOC for program enhancements. The Equity Sections had a signal triumph in *Island Development Corp. v. D.C.*, where the trial court granted the government's motion for summary judgment and dismissed a suit seeking almost \$500 million for the government's alleged breach of a lease allowing the plaintiff to develop Children's Island and Kingman's Island. The court accepted our argument that the lease was unenforceable because supervening events outside the government's control prevented the lease from being carried out. This case is now on appeal. The Equity Sections also successfully defended two key baseball-related suits: 1) in *Southeast Development Associates v. D.C.*, the owners of several properties in the area of the proposed new stadium sought a preliminary injunction against the government's proceeding to acquire any properties for the stadium pending a hearing on their claim that the Chief Financial Officer's required cost re-estimation understated the actual costs, but the U.S. District Court denied their request for an injunction and issued an order on October 31st dismissing the lawsuit; and 2) in *Robert Siegel, Inc., et al. v. D.C.*, the D.C. Superior Court dismissed a suit to enjoin the District from constructing the new stadium, holding, among other things, that the plaintiffs would have an adequate remedy at law when the government initiated eminent domain proceedings in the form of an award of just compensation.

The Fiscal Year 2006 budget that the Council and the Mayor approved and sent to the Hill includes an enhancement of approximately \$570,000 for litigation-related contractual services across OAG, such as expert witnesses, depositions, exhibits, and transcripts. I very much appreciate this response to my request for a more realistic litigation support budget. The \$570,000 enhancement will result in greatly improved efficiencies in OAG's entire litigation program.

As you know, OAG is responsible for conducting all of the law business of the District of Columbia, and represents the City in virtually all of its lawsuits. In this role, we have the opportunity to learn about, and identify, policies and practices by various agencies and instrumentalities of the government that create potential liabilities

or risks for the District. Typically, this information comes to us through our representation of agencies when they are sued. During the discovery process, we have access to government witnesses, personnel information, and agency documents that will, on occasion, highlight a need for an agency to alter its practices. We also have access to such information when we assist agencies and the EOM in negotiating commercial transactions on behalf of the District. When we see patterns within or among agencies where reform is needed, we communicate that information to the relevant Agency Director or General Counsel, the responsible Deputy Mayor, or the City Administrator. Through this process we are able to serve as an ‘early warning’ system to help agencies adopt better practices.

While the information that comes from claims and lawsuits against the District government is an important tool in helping to identify risk, under the current configuration, OAG only has access to information once a matter becomes the subject of a lawsuit. Pre-litigated claims, by contrast, are handled by the Office of Risk Management (“ORM”). By virtue of a reorganization that occurred during FY 2004, ORM assumed responsibility for handling the claims and managing the Settlements and Judgment Fund. All notices advising the District of a claim that are required pursuant to D.C. Official Code Section 12-309, are sent directly to ORM. It is that office that determines whether a claim will be paid before a lawsuit is initiated. It is only when the claim is denied, or not timely paid, and a complaint is filed that OAG becomes aware of the matter. Consequently, information about the actions of District agencies that is giving rise to claims and potential liability can be found at ORM as well as OAG.

- Appellate Division. The Appellate Division, with 11 lawyers, successfully handled both offensive criminal and juvenile appeals and defensive civil appeals in many very important cases this year, establishing important precedent for the District and saving the District millions of dollars. They were successful in scores of cases by filing dispositive motions, settling the cases, or obtaining favorable decisions after full appellate review.

An example of an appellate victory that saved the District huge sums was the case of *Alegria v. District of Columbia*, where we had a significant victory under the Individuals with Disabilities in Education

Act. The D.C. Circuit ruled that parents who settle their complaints with the D.C. public schools are not entitled to attorney's fees. Because 90% of IDEA complaints are settled at the administrative level, this ruling should save DCPS several million dollars in attorneys fees a year, money that can instead be put into special education programs for students.

On the public health and safety side, the Appellate Division won a favorable decision from the full D.C. Court of Appeals in the *Beretta* case, upholding the constitutionality of the Assault Weapons Manufacturing Strict Liability Act of 1990 from challenges under the Commerce and Due Process Clauses. Further, the Division has been coordinating efforts in our complex Clean Air Act cases with the Department of Health's General Counsel's Office and with the Assistant Attorneys General of more than a dozen states. There were also several emergency appeals. One was the Verizon case where Verizon threatened to disconnect service to the District Government. In another, the Division successfully handled in a 24-hour period an appeal of a case where the Superior Court had enjoined the MPD's promotional examination.

The Appellate Division placed special focus this year on child neglect, TPR, and adoption appeals. A single attorney in the Division coordinated the District's position in those appeals in order to develop the precedent that is needed to guide the lower courts as they decide how to best meet the needs of the District's most vulnerable residents. That attorney also served as a legal advisor to the trial attorneys in the Child Protection Sections, giving them guidance and assistance with trial-related matters, including the filing of government appeals.

- Family Services Division. The Child Protection Sections conquered the backlog of Termination of Parental Rights ("TPR") cases in a remarkably short period of time, after creating a specialized TPR unit and devoting four line attorneys and a section chief to this initiative full-time. In just seven months, between November 2004 and June 2005, we addressed 448 backlogged TPR cases. In each of the 448 backlogged cases, attorneys attended the CFSA clinical staffing to give legal advice about whether termination of parental rights was necessary. If a TPR motion was deemed necessary (as it was about one third of the time, or in 171 cases), the Assistant Attorney General

(“AAG”) filed a motion within 30 days of the staffing. The breakdown of the backlog is as follows:

TPRs Filed	171
Compelling reason determinations that a TPR is not justified	230
Reunifications with family	6
Guardianship petitions filed	8
Cases closed	7
Adoption petitions filed	26
TOTAL	448

We have been keeping current with our TPR obligations so that a new backlog will not develop. In every case in which the goal is changed to adoption, we are taking legal action within 30 days, as required by statute. We are filing on average about eight TPRs per month to stay current. There are currently 188 TPR cases on the Family Court docket: 131 cases have been set for a hearing and a majority of these cases (82) already have a trial date. So far, we have tried 40 TPR cases, with 32 case won, one case lost, and seven cases awaiting decision. Of the 50 or so cases that have not been set for trial, many are on track for adoption, so that a TPR trial will not be necessary. In the balance of the cases, we are working with the Presiding Judge of the Family Court to see that the cases are set for trial.

OAG’s Domestic Violence Section assisted 3,332 people at the Domestic Violence Intake Center at the D.C. Superior Court and another 1,541 people at the satellite center at Greater Southeast Community Hospital.

Our Mental Health Section is keeping up with the recent changes to the Ervin Act, including the new requirement in the Mental Health Civil Commitment Extension Temporary Act of 2004, effective in December 2004, that the Department of Mental Health (“DMH”) file a recommitment petition every year for all civilly committed patients. DMH has 18 months from the effective date of this law to elect whether to file petitions for re-commitment for the 532 civilly committed patients (both in-patients at St. Elizabeths and out-patients in the community at a core service provider). As of October 26, 2005, OAG had:

- Converted 121 persons to voluntary (these are all outpatients and they are no longer in committed status);
- Filed 44 recommitment petitions, most of which are pending;
- Recommitted two persons;
- Had three recommitment petitions denied by the Commission on Mental Health; and
- Voluntarily dismissed four recommitment petitions at DMH's request.

The remaining approximately 350 persons still have to be evaluated.

- Civil Enforcement Section (Public Safety Division). Fiscal Year 2005 was extraordinary in terms of OAG's success in combating fraud against the government. As you know, in February of 2005 OAG reached a \$4.8 million settlement under the District's False Claims Act with the real estate firm of Cushman & Wakefield, the contractor/project manager for the renovation of the government's office space at One Judiciary Square. (Our case against the remaining defendants, including former Office of Property Management Deputy Director Michael Lorusso, is pending in D.C. Superior Court.) As a result of the Cushman & Wakefield settlement, we received \$1.2 million for the District's Anti-Fraud Fund, while the remainder went to the District's General Fund. Assuming the proposed FY 2006 appropriation for the new money in the Anti-Fraud Fund is approved, OAG plans to hire one full-time attorney and one paralegal or investigator devoted exclusively to anti-fraud work. Anti-fraud work is not the only source of collections for OAG's Civil Enforcement Section. In Fiscal Year 2005, the work of that Section resulted in more than \$9 million in civil recoveries and collections, way up from over \$6 million in Fiscal Year 2004.
- Consumer and Trade Protection Section (Public Safety Division). Fiscal Year 2005 was a very productive one for the antitrust and consumer protection areas of OAG, where we recovered just over one million dollars from consumer protection and antitrust settlements. This marked an increase of more than \$700,000 over Fiscal Year 2004 recoveries. For example, OAG reached an agreement with the insurance brokerage firm, Marsh & McLennan Companies, Inc.

("Marsh"), to resolve an anti-trust investigation regarding whether Marsh improperly influenced bidding by insurance companies to serve Marsh clients, thereby depriving the clients of the benefits of unfettered competition. As a result of this agreement, my Office is directly monitoring Marsh to ensure the company is complying in the District with national business reforms required by a settlement reached earlier this year with the New York Attorney General. The settlement agreement allows my staff to have ready access to Marsh employees and business records. As a further example, OAG reached an agreement in the antitrust case OAG brought against CVS Corporation concerning the company's purchase and closing in 2002 of a competing pharmacy in the District's Palisades neighborhood. Under the agreement, CVS paid \$350,000 to the D.C. Pharmaceutical Resource Center's Interim Emergency Medication Project, to be used to provide chronically ill, uninsured District residents access to free medication from pharmaceutical manufacturers' patient assistant program. CVS also paid an additional \$125,000 into the District's antitrust enforcement fund and agreed, for a three-year period, to price constraints on its Palisades store and to continued delivery service from that store.

OAG maintains a consumer hotline and posts consumer information as well as a consumer complaint form on its web-site. The hotline number is 442-9828. A full-time consumer protection specialist responds to consumer inquiries and complaints received on the hotline, as well as to complaints submitted through the web-site. When a consumer has a dispute with a merchant, the consumer protection specialist may be able to help the parties resolve the dispute. For the 10-month period ending September 30, 2005, OAG helped to resolve 58 consumer-merchant disputes, resulting in total consumer savings of \$25,702.91. In addition, OAG uses consumer complaints to identify business practices that may violate the District's consumer protection law.

During Fiscal Year 2005 we added one 13-month Legal Analyst position for consumer protection. During Fiscal Year 2006 we plan to add a similar position for antitrust. Both are short-term positions designed for recent law school graduates who are awaiting admission to the bar. The idea is to have clerkship-style positions that can easily be eliminated if, in the long run, our consumer protection and antitrust

recoveries fail to keep up with our personnel expenses. With these new hires, we will have a total of two consumer attorneys, one consumer legal analyst, one consumer protection specialist, two antitrust attorneys, and one antitrust legal analyst.

- Criminal Section (Public Safety Division). Besides actively pursuing claims under the District's False Claims Act, Fiscal Year 2005 also saw the renewal of a lapsed MOU with the District's Department of Human Services ("DHS"), in which DHS now funds two full time attorneys to exclusively prosecute food stamp and welfare fraud. Since the project's inception in January of this year, over \$100,000 in recoveries have been negotiated. Similarly, thanks to grant funding and intra-District funding by the Office of Tax and Revenue, OAG has been similarly successful in prosecuting general fraud and tax fraud. In addition to recovering a total of more than \$500,000 combined in approximately 15 tax fraud cases, OAG is currently pursuing cases against individuals who are alleged to have defrauded the government in a variety of ways, including submitting falsified timesheets in the welfare-to-work program and filing false claims for workers compensation.

As I reported when I appeared before you last March, OAG also continues to work closely with the D.C. Public Schools ("DCPS") and the Family Court, among others, to stem rising truancy rates. For the 2004-2005 school year, OAG charged over 200 parents for violations of the District's Compulsory School Attendance Act ("CSA"). Under that provision, parents, guardians and caretakers can be criminally prosecuted if they fail to ensure that children in their custody or control are attending school regularly. However, as you will recall, rather than take a purely punitive approach, in 2003 the OAG created a deferred sentencing program, which is similar to a diversion, for such cases. That program continues today. Through deferred sentencing, first-time CSA defendants who have had no other criminal convictions, and who plead guilty to CSA charges are given the option, by OAG, for a period of a least one full school year of supervision, to cooperate with services and to ensure that their children attend school without any unexcused absences or tardiness. In addition, in October 2005, through the collaborative efforts of OAG, the Family Court, DCPS, and the Department of Health, for the second year in a row, approximately 40 parents who were charged

with CSA violations for failing to get their children immunized in time to attend school had the opportunity to obtain those immunizations at the courthouse when they appeared in court for arraignment. Eligible parents were offered deferred sentencing on their previous offense of failing to send their children to school, once their children were immunized.

The Criminal Section continued to do a superb job of addressing the thousands of criminal charges it brought in FY 2005 involving quality of life offenses, such as drinking in public and disorderly conduct, and traffic offenses, including Driving Under the Influence (“DUI”) and Driving While Intoxicated (“DWI”). As you know, OAG shares criminal prosecution authority with the U.S. Attorney’s Office for local offenses. An issue recently arose in the media concerning the extent to which the current population of the D.C. Jail is attributable to offenses prosecuted by OAG. Because most of the serious misdemeanors and felonies in the District are still prosecuted by the local U.S. Attorney, the data my Office has obtained for a typical period, August 25, 2004-October 4, 2005, shows that most of the population of the D.C Jail is attributable to offenses prosecuted by the U.S. Attorney’s Office. By contrast, during that period on average only about 3% of all incarcerated D.C. Jail inmates (those held following the imposition of a sentence for conviction of a crime) on any given day had an OAG-prosecuted offense as the most serious offense causing commitment. Similarly, on average only approximately 7% of all persons detained at the Jail on any given day – that is, ordered held pending trial or sentencing – were in OAG cases; and on average only 12.5% of intakes on any given day at the Jail – which means all people who passed through, regardless of whether they were later detained or incarcerated – involved OAG cases.

When I appeared before you last April to discuss the Office’s Fiscal Year 2006 proposed budget, I noted the Mayor’s proposal included local funding for eight FTEs that would otherwise be eliminated due to cutbacks in federal grant funding. One of these was for the Criminal Section, three were for the Juvenile Section and four were in our Neighborhood and Victim Services Section – all in the Public Safety Division. I also indicated the need for additional local funding

in the Public Safety Division for some positions that already existed and were threatened by the reduction in federal grants, and some that were new. I am extremely grateful that the budget proposal the Mayor and the Council approved and sent to Congress contains local funds for all of these positions. I note that federal cutbacks, and some intra-District funding reductions, ultimately resulted in the elimination of 13 positions in the Public Safety Division. Some of these were anticipated, but others were not. Nevertheless, assuming that Congress passes the District's proposed budget as presented, the significant efforts of the Mayor and the Council to bolster OAG's public safety program will enable OAG to create four new positions, in addition to ensuring that none of the Sections within the Division suffer a net loss of staff in Fiscal Year 2006 as a result of other funding reductions. One of the four new positions will go to the Consumer and Trade Protection Section, which otherwise sustains itself almost entirely on special revenue funds. The remaining three new positions will go to the Criminal Section, where currently only eight attorneys handle the lion's share of the more than 10,000 cases presented to that Section annually. While I am extremely grateful, I would be remiss if I did not point out that some of the unanticipated funding losses in Fiscal Year 2006 limit us to adding a new of only four new positions, and there are additional positions for which grant funding is very likely to expire at the end of Fiscal Year 2006. Therefore, although the Division will be able to enjoy some critical additions to the staff in the current fiscal year, those additions could be easily subsumed by further reductions in grant funding that we anticipate at the end of Fiscal Year 2006. I will look forward to working with the Committee again during the upcoming budget cycle to ensure the stability of OAG's public safety programs for Fiscal Year 2007.

Legal Advice and Transactions

- Legal Counsel Division. The Legal Counsel Division's prolific output noted earlier included the review or drafting of a large number of significant legislative proposals. Working with the Mayor's Office and the Council, the Division assisted in the drafting of what became Bill 16-114, the "Prescription Drug Excessive Pricing Act of 2005," which is now pending congressional review. When it becomes law, this measure will make the excessive pricing of patented prescription

drugs a consumer protection violation subject to civil fines and injunctive relief. The Pharmaceutical Research and Manufacturers of America has already filed a lawsuit in the U.S. District Court to enjoin the measure's implementation, and OAG successfully defended against the plaintiff's motion for a temporary restraining order, which the court denied on October 13, 2005. The Division drafted Bill 16-247, the "Omnibus Public Safety Act of 2005," which was the subject of a hearing before this Committee last May and is one of the Mayor's top legislative priorities for 2005-06. As you know, Bill 16-247 contains 22 titles and would provide comprehensive reform of local criminal law in the areas of violent crime, crimes against children, prostitution-related crime, and personal privacy. The Division was also extremely busy drafting numerous bills concerning child support enforcement, such as: 1) Bill 16-205, the "Child Support Guideline Revision Act of 2005," which incorporates the recommendations of the Child Support Guideline Commission and is now being considered by the full Council; 2) D.C. Law 15-341, the Child in Need of Protection Act of 2004, effective April 12, 2005, which will require state criminal records checks for potential foster and adoptive parents; 3) D.C. Law 15-357, the Omnibus Public Safety Ex-Offender Self-Sufficiency Act of 2004, effective May 24, 2005, which addresses the child support obligations of incarcerated non-custodial parents; and 4) the emergency and temporary versions of the "Income Withholding Transfer and Revision Amendment Act of 2005," D.C. Acts 16-167 and 16-184, respectively, which transfers the child support wage withholding function from the D.C. Superior Court to OAG. The Legal Counsel Division also directly served the District's citizens by continuing to provide oral and written legal advice at the request of Advisory Neighborhood Commissions.

- Commercial Division. Commercial Division attorneys were involved in a multitude of aspects of the important initiative to construct a new baseball stadium. Most recently, Real Estate Section attorneys, working with the Executive Office of the Mayor and the Office of Property Management, oversaw efforts to get all 14 acres of the planned stadium site appraised, to initiate offers to the 23 property owners, and to negotiate with those owners responsive to the government's overtures. These negotiations have led to letters of commitment to seven of the owners. For the remaining 16 owners with 84% of the site, on October 25, 2005 we filed an eminent domain

action and deposited the government's estimate of the value of their property, \$84 million, in a court-monitored trust. We recently engaged a team of real estate and eminent domain practitioners from Venable, LLP, to partner with us in this litigation. Because of the tight timelines to which the District committed in the Baseball Stadium Agreement with Major League Baseball, we expect to move expeditiously in the litigation to establish the government's right to possess the remaining properties, although the title to the properties passed to the government immediately on the filing of its declaration of taking. While the valuation phase of the litigation may take some time, we are confident that the government's title and possessor rights will ultimately be affirmed.

The Land Use Section of the Commercial Division worked with the Office of Planning and advocacy groups to provide legal advice and to quickly get out notice for hearings on the issue of whether the government should enact a mandatory inclusionary zoning program, which would require new or rehabilitated residential developments in the District to set aside a certain percentage of units for affordable housing. Also, the Real Estate Section, working with the Mayor's Home Again Program, was able to obtain title to nearly 40 previously abandoned, vacant or otherwise nuisance residential properties that can now be returned to active homeownership and the tax rolls. Meanwhile, the Economic Development Section has been instrumental in ensuring that the government better fulfills its commitment to increase the number of affordable housing units. This past year, the attorneys in that section worked with DHCD program staff to close 35 loans and grants, making available almost \$100 million for affordable housing and community facilities.

Child Support Services

I have already described the extraordinary increases in the number of new support orders established and the amount of child support receipts collected. These results are attributable to the sustained effort and creativity of CSSD, including the "Amnesty 2005" initiative, which raised more than \$225,000 alone.

In December 2004 CSSD successfully transitioned the State Distribution Unit from the D.C. Superior Court to OAG and has maintained a 99.8% rate

of support receipts processed in the same day. In addition, in August 2005 CSSD successfully transitioned the wage withholding function from the Superior Court to OAG, pursuant to the emergency legislation I discussed earlier. As of October 2, 2005, CSSD had sent out more than 1,800 wage withholding orders to employers.

Assuming congressional approval of the District's proposed budget, during Fiscal Year 2006 we will use the budgeted allotment of \$100,000 to hire staff to enforce the non-custodial parent initiative set out in Title I(L) of the Fiscal Year 2006 Budget Support Act of 2005 ("Budget Support Act"). Moreover, CSSD will use the designated Fiscal Year 2006 appropriation of approximately \$1.47 million to carry out the child support pass-through of \$150 that Title V(D) of the Budget Support Act requires to be implemented as of April 1, 2006.

***Pro Bono* Legal Assistance from the Private Bar**

In May 2005, we launched the Special Assistant Attorney General Program, which offers private attorneys the opportunity to gain invaluable, hands-on civil trial and/or appellate experience, while providing much needed additional staffing to handle our ever-increasing workload. Our first partner in this venture is the firm of Fulbright & Jaworski. They have agreed to provide to our Civil Litigation Division, on an ongoing basis, two attorneys for 20 hours a week, in six-month rotations. In addition, they have and will continue to provide attorneys to work on appellate cases on a more *ad hoc* basis. This has been an extremely successful and productive partnership. We have also had several other private attorneys volunteer their time to work in the Appellate and Public Safety Divisions. We have been in contact with several other firms who are interested in the Special AAG Program and hope to expand the program in the coming year.

IV. Status of the Transition of Agency Counsel into OAG

When I testified last spring concerning the Mayor's Fiscal Year 2006 budget proposal for OAG, there was pending before the Council a legislative proposal for the transfer of Legal Service attorneys and related non-legal staff employed by the other subordinate agencies to the employment and control of OAG. This proposal, entitled the Legal Service Amendment Act of 2005, was designed to end the existing bifurcation of the Legal Service.

The new proposal retained the subordinate agencies' responsibility for compensating and providing program support to Legal Service attorneys and their non-legal staff out of their own budgets during Fiscal Year 2006. But the proposal authorized OAG to manage the Legal Service portion of their budgets – including personal and non-personal services, grants, and allotments for administrative overhead, supplies, and equipment – and anticipated that the Legal Service portion of these budgets would be folded into OAG's Fiscal Year 2007 budget. In short, the proposal envisioned a truly unified Legal Service.

The Council passed and the Mayor signed the Legal Service Amendment Act of 2005, which took effect in late July, with an applicability date of October 1st. Because the required transfers will affect 24 agencies¹ and nearly 100 attorneys (plus their support personnel), OAG began planning for the transition as soon as the new law took effect. I established a Transition Team consisting of a cross-section of OAG and other subordinate agency personnel from a variety of disciplines, such as legal service management, IT, finance, human resources, labor relations, and facilities management. I charged the Team to reach out to agency directors, agency counsel, their support staff, key members of OAG, and the Executive Office of the Mayor

¹ The 24 agencies are:

Alcohol Beverage Regulations Administration ("ABRA")
Child and Family Services Agency ("CFSA")
Department of Consumer and Regulatory Affairs ("DCRA")
Department of Corrections ("DOC")
Department of Employment Services ("DOES")
Department of Insurance, Securities, and Banking ("DISB")
Department of Health ("DOH")
Department of Human Services ("DHS")
Department of Mental Health ("DMH")
Department of Motor Vehicles ("DMV")
Department of Parks and Recreation ("DPR")
Department of Public Works ("DPW")
Department of Youth Rehabilitation Services ("DYRS")
District Department of Transportation ("DDOT")
District of Columbia Office of Personnel ("DCOP")
District of Columbia Taxicab Commission ("DCTC")
Fire and Emergency Medical Services Department ("FEMSD")
Metropolitan Police Department ("MPD")
Office of Cable Television and Telecommunications ("OCTT")
Office of the Chief Medical Examiner ("OCME")
Office of the Chief Technology Officer ("OCTO")
Office of Contracting and Procurement ("OCP")
Office of Human Rights ("OHR")
State Education Office ("SEO").

for ideas on how best to unify the Legal Service. The Team interviewed hundreds of people and gathered voluminous case and workload data. It carefully analyzed the data and made findings and recommendations.

Among the Team's findings:

- 1) Agency Counsel have very broad responsibilities covering a number of subject areas. Agency counsel typically furnish general legal advice to the agency director, senior managers, and occasionally to program staff on a wide range of subjects, including personnel and disciplinary matters, drafting legislation and rulemaking, and reviewing contracts.
- 2) Agency directors uniformly consider their general counsel as members of their senior management team and are very satisfied with their work. When agency directors were asked to rate their satisfaction with agency general counsel on a scale of 1 to 5 (5 being the most satisfied), the overall average was 4.87.
- 3) There is a good existing relationship between agency counsel and OAG, although regular communication could be improved. When agency directors were asked to rate the overall relationship between their agency and OAG on a scale from 1 to 5 (5 being the best), the overall average was 4.33.
- 4) Agency general counsel offices are organizationally unique within OAG. These offices have some features of OAG's divisions and some features of OAG's sections, which are units with the divisions. For example, they are like a division in displaying multiple practice areas but like a section in being a small group of attorneys having one primary client.
- 5) Agency counsel have unique relationships with their agencies, with each other, and with OAG. For example, some agency counsel offices provide substantive policy advice and prepare technical documents. Also, some of these offices share and coordinate on many legal issues.
- 6) The current supervisory structure does not lend itself to substantive OAG supervision of agency counsel work. The current Deputy Attorney General for Agencies and Legislative Affairs is responsible

for supervising nearly 100 agency counsel, including 24 general counsel.

- 7) There is a need for a central rulemaking group to support many of the agencies. Most agency directors report that their general counsel office cannot keep up with rulemaking because of the press of other business. Some agencies are years behind in rulemaking. The rulemaking process could be significantly streamlined with a centralized Rulemaking Division whose primary responsibility would be to support the Agencies in drafting legally sufficient rules.
- 8) There is a need to build capacity in certain agency general counsel offices for legal advice on drafting contracts. Certain agencies, such as CFSA, DDOT, DMH, and DPW, could benefit from having an attorney or attorneys with sufficient skill working with contracting personnel to develop legally sufficient contracts.
- 9) There is a need to provide central legal services to agency general counsel offices where the expertise resides in other parts of the Legal Service. For example, some agency directors and general counsel raised a concern with needing to develop expertise in FOIA, personnel actions and proposed discipline. There are attorneys elsewhere in the Legal Service with this experience. A structure needs to be implemented to ensure regular communication and access to this legal expertise.
- 10) There is a great need to share OAG's ProLaw matter management system with the agency general counsel offices. Agency general counsel offices are very inconsistent in the way they track their work assignments, with some offices having no tracking system at all.
- 11) It is essential that all agency counsel continue to serve their agencies in an attorney-client relationship. Each agency attorney should have as his or her performance goal the provision of effective legal services to assist the agency in reaching its policy objectives. Indeed, three of the five performance goals in each agency lawyer's PMP work plan will be matched with the agency's mission and goals. This will ensure continued input from agency directors and ensure zealous representation.

- 12) It is essential that all agency counsel continue to serve their agency on-site. It was uniformly agreed that, to be effective, agency general counsel must speak with their agency directors in person every day, sometimes multiple times per day.

I am now in the process of developing a new organizational structure for the agency general counsel offices that will:

- Promote substantive connections with other agency counsel offices and OAG divisions and sections;
- Promote substantive supervision;
- Promote streamlined and shared decision-making; and
- Generally mirror the EOM agency clusters.

Although some of the details still need to be worked out with agency counsel and other OAG staff, I believe one or more new OAG divisions may be required to group together the agency general counsel offices that have similar functions or similar legal needs. I expect to complete the transition and restructuring of agency general counsel offices by the end of this year and will share the results with you, Chairman Mendelson, and the other members of this Committee.

Thank you for taking the time for this interim oversight hearing. I am happy to answer any questions.